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No. 93-——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PARDEE & CURTIN LUMBER COMPANY and
THE SUN LUMBER COMPANY,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Webster County, West Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether assessment of coal property at a flat rate per acre regardless of whether the property is barren, mined out, or contains valuable mineable seams—when state law requires property to be assessed at its true and actual value—violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as this Court unanimously held in *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931), a precedent reaffirmed in the Court's recent decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County*, 488 U.S. 336 (1989).

PARTIES TO THE PROCEEDING

Petitioners Pardee & Curtin Lumber Company and The Sun Lumber Company are West Virginia corporations. Pursuant to S.Ct. Rule 29.1, Pardee & Curtin notes that it is a wholly-owned subsidiary of Pardee Resources Company. The other subsidiaries of Pardee Resources Company are also wholly-owned. The Sun Lumber Company has no parents or subsidiaries. Respondent County Commission of Webster County, West Virginia is the official entity that confirmed the challenged assessments of petitioners' property.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Pardee & Curtin Lumber Company and The Sun Lumber Company respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Webster County, West Virginia, entered in the above-captioned proceeding on August 21, 1992.

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia denying leave to appeal is unreported and is reprinted in the appendix hereto ("App.") at 1a. The order of the Circuit Court of Webster County is unreported and is reprinted at App. 3a. Transcripts of proceedings before the Circuit Court, explaining its decision, are reprinted at App. 29a and 31a.

JURISDICTION

Petitioners challenged the assessments on their properties in Webster County for tax years 1990, 1991, and 1992 before the County Commission of Webster County, sitting as a Board of Equalization and Review. *See* W. Va. Code § 11-3-25. Among the grounds asserted by petitioners was that the assessments violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See* Notice of Protest, Webster County Commission, ¶ 1 (Feb. 7, 1990); Notice of Protest, Webster County Commission, ¶ 1 (Feb. 1, 1991); Notice of Protest, Webster County Commission, ¶ 1 (Feb. 1, 1992). The County Commission upheld the assessments and petitioners filed suit in the Circuit Court of Webster County. Petitioners reiterated their federal claim that the assessments violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See* Petition for Appeal ¶ 4a, f, h (March 28, 1990); Petition for Appeal ¶ 4a, f, h (March 19, 1991); Petition for Appeal ¶ 4a, f, h (March 13, 1992). On August 21, 1992, the Circuit Court issued an order rejecting petitioners' challenge, and upholding the assessments for tax years 1990, 1991, and 1992. App. 3a.

Petitioners filed a timely application for leave to appeal the Circuit Court order to the Supreme Court of Appeals of West Virginia, again specifically reiterating their challenge based on the Fourteenth Amendment. *See* Petition for Appeal and Note of Argument on Behalf of Petitioners Below at 20-23 (Dec. 17, 1992). That court denied leave to appeal on April 14, 1993, with Justice Brotherton dissenting and Justice Neely absent. App. 1a.

On July 6, 1993, Chief Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including August 12, 1993. App. 36a. The jurisdiction of this Court to review the judgment below is based on 28 U.S.C. § 1257, petitioners' federal claim having been raised and preserved at each stage of the state proceedings.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

Article X, Section 1 of the West Virginia Constitution provides that "all property, both real and personal, shall be taxed in proportion to its value." Section 11-3-1 of the West Virginia Code provides that "[a]ll property shall be assessed annually * * * at its true and actual value * * *."

STATEMENT OF THE CASE

This case is the sequel to this Court's recent decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County*, 488 U.S. 336 (1989), involving the same county whose assessment practices were struck down in that case. Prior to that decision, the tax assessor of Webster County, West Virginia employed what was known as the "welcome stranger" approach to assessing real property for tax purposes. Under West Virginia law, property taxes are levied based on a uniform assessment percentage of the subject property's "true and actual value." W. Va. Const. Art. X, § 1; W. Va. Code § 11-3-1. Rather than appraising property to arrive at its true and actual value, however, the Webster County assessor would assess each parcel on the basis of its purchase price. If a property had not been recently sold, it was carried on the tax rolls with the same assessment it had borne in prior years, with only insignificant adjustments. The result over time was great disparity in the assessment of parcels with similar market values, with new purchasers (the "welcome strangers") shouldering a disproportionately heavy share of the tax burden.

This Court unanimously held that this practice violated the Equal Protection Clause of the Fourteenth Amend-

ment. 488 U.S. at 343. In his opinion for the Court, Chief Justice Rehnquist noted that because West Virginia law specified that "all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State *according to its estimated market value*," *id.* at 345 (emphasis added), Webster County could not seek to justify the disparities resulting from its assessment system on the basis of any other policies. *Id.* at 346. The "welcome stranger" system was not rationally related to the objective of assessing property on the basis of its current market value, because it systematically led to vast disparities in the assessments of properties of the same market value.

The response of the Webster County assessor to this Court's decision in *Allegheny Pittsburgh* was not to appraise property in Webster County on the basis of true and actual value. Instead, the assessor assigned a flat "appraised" value of 250 dollars per acre to all coal property in the county, with a resulting assessed value (60 percent of the appraised value) of 150 dollars per acre for all coal property, terming this approach the "weighted average" method. Transcript of Hearing, Webster County Commission, at 12 (Feb. 7, 1991). As was the case with the prior welcome stranger approach, the assessor refused to consider any individual characteristics of particular parcels of coal property in assigning the flat 150 dollar per acre assessment to the parcels:

> Q. Did you make any consideration at all * * * whether or not there was mining going on a piece of property?
>
> A. No.
>
> Q. And again you did not consider whether it was barren?
>
> A. No.
>
> Q. And you did not consider whether it was unmineable?
>
> A. No.
>
> Q. And you did not consider whether it was mined out?
>
> A. No.

Transcript of Hearing, Webster County Commission, at 6-7 (Feb. 19, 1991). *See also* Transcript of Hearing, Webster County Commission, at 15 (Feb. 16, 1990) ("Q. So that you don't know how much coal may have been there, and it may have been unmineable and unmerchantable; you still put the One Hundred Fifty Dollar value on that coal? A. That's correct."); Transcript of Hearing, Webster County Commission, at 22 (Feb. 15, 1991) ("Talbott: And you did not, then, take into consideration what it would buy, or be bought for or sold for, a reasonable buyer and a reasonable seller, not being forced to, you didn't use that? Lynch: No.").

Nor did the assessor consider the various factors set forth in the West Virginia Tax Department's *Guide for Assessors* as pertinent in arriving at the true and actual value of coal property subject to taxation. Transcript of Hearing, Webster County Commission, at 3-5 (Feb. 19, 1991). The *Guide* noted that adjustments in the value of coal property should be made for, *inter alia*, "[d]epletion of coal due to mining, construction, or other activities," the "unmineability of a seam or seams on a parcel due to geological or economic reasons," and the "barrenness of a coal property." The assessor confirmed that these factors were not taken into consideration, and that the 150 dollar per acre value was assigned to "all acreage regardless of whether it was mineable, barren, or unmineable, or had been mined out."

Indeed, the source of the 150 dollar figure remains something of a mystery, as revealed by the following testimony of the assessor:

> Q. Dana, on the weighted average, can you tell us how you determined the weighted average of [$150]; do you have your facts and figures that you can refer back to?
>
> A. No, sir.
>
> Q. What happened to them?
>
> A. Well, I had so many different pages of figures that I just decided on one, and threw them all away.

Transcript of Hearing, Webster County Commission, at 9 (Feb. 19, 1991). *See also* Transcript of Hearing, Webster County Commission, at 14 (Feb. 7, 1991) ("I threw all my notes away, and I said, 'This is what we'll go with.' ").

The assessor testified that he applied a flat rate to all coal property because he thought such an approach was compelled as a result of the *Allegheny Pittsburgh* litigation. He frankly conceded that the figure may not reflect the actual value of the property:

> Well, it's not necessarily my opinion that coal property with no coal on it is worth One Hundred Fifty Dollars an acre. What I have done is establish a system. You know, I think I've tried to tell you that I established a system to appraise all coal property in Webster County to comply with the court order. It is not necessarily my opinion that it is the value of the property, and it is not, maybe, the true and actual value of the property.

Transcript of Hearing, Webster County Commission, at 16 (Feb. 16, 1990).

The application of a flat 150 dollar per acre assessment to all coal property meant that the assessment on Pardee & Curtin's property jumped 221 percent from 1989 to 1990, while Sun Lumber's jumped 393 percent. Exhibit A, Petition for Appeal and Note of Argument on Behalf of Petitioners Below (Dec. 17, 1992). Petitioners protested their assessments before the Webster County Commission, which sat as a Board of Equalization and Review. *See* W.Va. Code § 11-3-25. Both Pardee & Curtin and Sun Lumber introduced evidence that among the property they owned taxed as coal property were parcels containing no mineable coal. *See* Transcript of Hearing, Webster County Commission, at 138 (Feb. 21, 1990), 223 (Feb. 26, 1990). Petitioners argued, *inter alia*, that the assessor's practice of assigning a flat value for tax purposes to coal properties that actually varied widely in value contravened the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution. *See* Notice of Protest, Webster County Commission, ¶ 1 (Feb. 7, 1990); Notice of Protest, Webster County Commission, ¶ 1 (Feb. 1, 1991); Notice of Protest, Webster County Commission, ¶ 1 (Feb. 1, 1992). Petitioners explained that this Court had so held in *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931), a precedent reaffirmed by the Court's more recent decision in *Allegheny Pittsburgh*. *See* Petitioners' Memorandum, Webster County Commission (Feb. 1991). The County Commission denied relief.

Petitioners then appealed to the Circuit Court of Webster County. They again argued that the assessor's practice of assigning a flat assessed value for tax purposes to coal properties that actually varied widely in value contravened the Equal Protection Clause of the Fourteenth Amendment. *See* Petition for Appeal ¶ 4a, f, h (March 28, 1990); Petition for Appeal ¶ 4a, f, h (March 19, 1991); Petition for Appeal ¶ 4a, f, h (March 13, 1992).

The Circuit Court denied relief and affirmed the challenged assessments in an order entered August 21, 1992. App. 3a. The order explained that the court's reasoning was set forth in its announcement of decision, attached to the order. App. 17a. The court upheld the assessor's use of a flat value for all coal property as an effort to comply with this Court's decision in *Allegheny Pittsburgh*. According to the Circuit Court, the assessor "was mandated by order of the Court to take action to secure equality in the assessments. And that is what he undertook, after receipt of the decision of the United States Supreme Court." *Id.* at 22a.

The Circuit Court stated that "[t]here was a lack of evidence * * * on [the] part of the protesting taxpayers to show what the property in question was actually worth," App. 23a, and rejected petitioners' equal protection claim by noting his view that coal property was worth more than the flat value assigned to it by the assessor:

> The issue gets back to how much that coal was worth an acre. And for someone to say that an acre of coal was worth $250, you know. As the common saying, get real. You know, it's worth more than $250 an acre, or $210, or whatever the figure is. [App. 29a.]

In a prior order rejecting the identical claims of other taxpayers in these proceedings, the Circuit Court elaborated on its reasoning, stating that "the approach by the assessor does take into consideration, in my opinion, the ability of some taxpayers to pay taxes." App. 34a. As the court explained, there are

> problems if you're going to attempt to apply a market value to all coal, because some individuals are not in a position, in terms of ability to pay and the ability to benefit from tax write offs, that individuals or corporations are entitled to by virtue of the fact that they're in the business and many of the taxes that are assessed are written off against other taxes and other expenses. And an individual who owns a tract of land that has coal on it is confronted with problems. [App. 33a.]

The court regarded the use of a flat rate applicable to all as a way of easing the burden that would otherwise fall on some individuals if their coal property were assessed on the basis of its market value.

Petitioners then sought review in the West Virginia Supreme Court of Appeals, again specifically arguing that "the Webster County Assessor's system of assessment is unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution." Petition for Appeal and Note of Argument on Behalf of Petitioners Below, at 20 (Dec. 17, 1992). That court denied leave to appeal, with Justice Brotherton dissenting and Justice Neely absent. App. 1a.

REASONS FOR GRANTING THE WRIT

More than sixty years ago, this Court held that applying a flat assessement to property of widely varying value, when state law required property to be assessed on the basis of its value, violated the Equal Protection Clause. *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931). That is precisely what the Webster County assessor has done in this case. This Court reaffirmed *Cumberland Coal* in its recent decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County*, 488 U.S. 336 (1989). In that case, this Court struck down Webster County's "welcome stranger" assessment system, because it resulted in properties of similar value being assessed at widely varying levels. The discrimination is the same under the present system, where properties of widely varying values are assessed at the same level.

Allegheny Pittsburgh made clear that, to survive equal protection scrutiny, Webster County's assessment system must be rationally related to the state's objective of assessing property on the basis of its market value. A flat rate assessment system by definition ignores the actual value of different properties, and is not rationally related to determining the market value of those properties. Other state courts have recognized the discrimination inherent in such an assessment approach. This Court should grant the writ to resolve the conflict between the decision below and *Cumberland Coal*, *Allegheny Pittsburgh*, and decisions from other state courts applying those precedents.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *CUMBERLAND COAL*

The decision below is flatly contrary to the unanimous opinion of this Court in *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931). The facts of that case and the present one are indistinguishable. In *Cumberland Coal*, as here, the tax assessor appraised all coal-bearing land at the same flat rate per

acre. The assessor then applied a uniform rate of assessment of 50 percent to the appraised value to arrive at the assessments, just as here the Webster County assessor applied a uniform rate of 60 percent to the appraised value to arrive at his assessments.

In *Cumberland Coal*, the coal company challenged this system under the Equal Protection Clause of the Fourteenth Amendment, noting that veins of coal located in areas that were remote and inaccessible were far less valuable than coal deposits located in close proximity to rail or river transportation. The company claimed that the assessor's uniform valuation of property discriminated in favor of those landowners whose coal property was more valuable because of its ready accessibility to means of transportation, and discriminated against those whose coal property was land-locked. Given that assessments were to be based on actual value, the owners with more valuable coal property should have carried a greater tax burden than the owners of the less valuable coal property. So too here, petitioners challenged the Webster County recreation of the *Cumberland Coal* system on equal protection grounds, noting that the value of coal property in Webster County varied greatly, depending on a variety of factors such as whether the property was barren, mined out, or contained valuable seams of readily accessible coal.

In *Cumberland Coal* this Court held that applying a uniform flat appraisal and assessment to coal properties of varying values violated the Equal Protection Clause. Writing for a unanimous Court, Chief Justice Hughes noted that there was a clear violation of equal protection when properties of the same class with equal appraised values were subjected to different assessment ratios (*e.g.*, assessing one parcel worth 1,000 dollars at 20 percent of its value and another worth 1,000 dollars at 60 percent of its value). The Court concluded that applying the same assessment ratio to properties with the same appraised or assigned values, when the actual value of the

respective parcels differed, resulted in effect in the same discrimination.

As Chief Justice Hughes explained:

> [T]he fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure * * * as the property of other owners which has an actual value admittedly higher. *Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.* [*Id.* at 29 (emphasis supplied).]

The Court noted that the unconstitutional discrimination was clear when "all the coal in a township * * * was assessed at the same value an acre, despite well known and important differences in value," and that "[t]he discrimination is essentially the same, and is equally repugnant to constitutional right, when both assessments are made on the basis of fifty per cent of assigned values and differences in actual values are deliberately and systematically disregarded." *Id.* at 29-30.

The foregoing describes *precisely* the system adopted by the Webster County assessor. In valuing coal property for tax purposes, the assessor "deliberately and systematically disregarded" "differences in actual values," and assessed each acre of coal property in the county at a flat value of 150 dollars. Unlike this Court in *Cumberland Coal*, however, the Circuit Court below did not invalidate the practice under the Equal Protection Clause. This Court should grant the writ to resolve the irreconcilable conflict between the decision below and this Court's decision in *Cumberland Coal*.[1]

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[1] *See also Southland Mall, Inc.* v. *Garner*, 455 F.2d 887, 889 (6th Cir. 1972) (taxpayer may establish violation of equal protection by

The Webster County Commission defended the challenged assessment practice below by arguing that "everybody would be treated equally," Transcript of Hearing, Circuit Court of Webster County, at 75 (May 14, 1992), and the court below upheld the practice as an effort "to obtain equality and uniformity in the assessment of real estate taxes." App. 23a. As this Court explained in *Cumberland Coal*, however, "[a]pplying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same." 284 U.S. at 29. The pertinent question is whether there has been discrimination in the assignment of relative tax burdens. Given that West Virginia law requires that property assessments be based on market value, less valuable property should carry a lesser burden than more valuable property. As this Court recognized in *Cumberland Coal*, it is not equal treatment to treat such property the same.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ALLEGHENY PITTSBURGH*

This Court's recent decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County*, 488 U.S. 336 (1989), reaffirmed the continuing validity of the *Cumberland Coal* precedent. *Allegheny Pittsburgh*, of course, involved the prior assessment practices of the same County at issue in this case. As noted, Webster

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showing that "his property was assessed at the same level as other properties because the taxing authorities intentionally chose to ignore clear differences in value which should have lessened his assessment") (citing *Cumberland Coal*). The court in *Southland Mall* distinguished the case before it from *Cumberland Coal* on the ground that in *Cumberland Coal* the assessor "acknowledged disregarding actual differences in value," while in *Southland Mall* the differences relied on by the taxpayer were considered and found not to affect the property's value. *Id.* at 890-892. In the present case, as in *Cumberland Coal*, the assessor and the County Commission acknowledged that they deliberately disregarded differences in coal property affecting its value. *See supra* 4-5; *infra* 19.

County had previously employed an appraisal and assessment system popularly known as the "welcome stranger" approach, under which property was appraised on the basis of its purchase price, with little if any adjustment of the assessed value of parcels that had not been sold for many years. The end result was that newly-sold property carried a far higher appraisal value than identical property that had not been sold for some time, with a resulting disparity in tax burden.

Again in a unanimous opinion by the Chief Justice, this Court held that such a practice violated the Equal Protection Clause of the Fourteenth Amendment. 488 U.S. at 343. Citing *Cumberland Coal,* the Court reiterated that "intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." 488 U.S. at 345 (quoting *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350, 353 (1918)). The Court emphasized that the pertinent consideration was "a comparative one." 488 U.S. at 342. The issue under the Equal Protection Clause was not whether the property of the petitioner coal companies was assessed at greater than market value, but whether it was appraised and assessed at a higher level than comparable property held by others. *Id.* The Chief Justice concluded that

> the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies petitioners the equal protection of the law. [488 U.S. at 346.]

In *Allegheny Pittsburgh,* the discrimination in appraisal and assessment derived from treating similar property in a different manner—similar parcels of equal market value

carried markedly different appraisals, depending on when they had been purchased. As a matter of basic logic, and of this Court's precedents, the resulting discrimination is the same when markedly *different* parcels are treated the *same*. If parcel A and parcel B are both worth $1,000, but parcel A is appraised at $100 and parcel B at $1,000 (because it was recently sold), parcel B will carry ten times the tax burden of parcel A. This was the discrimination condemned in *Allegheny Pittsburgh*. If, on the other hand, parcel A is worth $1,000 and parcel B is worth $100, and both are appraised at the flat rate of $100, parcel B will still carry ten times the tax burden of parcel A, assuming—as is the case here—that property taxes are to be based on actual value. This was the discrimination condemned in *Cumberland Coal*.

A flat rate applied regardless of property value is by definition arbitrary; it takes no account of a comparison of respective property holdings. Such a system may be acceptable when property taxes are based on something other than actual value, but a system based on actual value requires *some* effort to ascertain and distinguish among parcels on the basis of value. The flat rate approach of the Webster County assessor expressly eschews any such effort, and therefore bears no rational relation to the governmental objective.

A state presumably could decide to levy property taxes on some basis other than the current value of the property, and in such a circumstance a claim that the system of appraisal and assessment was not rationally related to ascertaining value would be unavailing. As this Court emphasized in *Allegheny Pittsburgh*, however, that is not what West Virginia has done:

> [West Virginia's] Constitution and laws provide that all property of the kind held by petitioners shall be taxed * * * according to its estimated market value. There is no suggestion * * * that the State may

> have adopted a different system from that specified by statute * * *. We are not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute. [488 U.S. at 345.]

The question, therefore, is simply whether the appraisal practice of the Webster County assessor is rationally related to taxing real property on the basis of its current market value. That is the only basis on which the current practice can be defended, just as it was the only basis on which the practice challenged in *Allegheny Pittsburgh* could be defended. And just as the welcome stranger approach could not be justified in such terms in *Allegheny Pittsburgh*, so too here a practice of applying a uniform flat rate to property of widely varying value cannot be justified as rationally related to taxing that property on the basis of its current market value.

This Court's decision in *Nordlinger* v. *Hahn*, 112 S.Ct. 2326 (1992), confirms the foregoing analysis. In that case, the Court upheld California's "Proposition 13," a property tax assessment system based on each individual owner's acquisition cost rather than true and actual value. Although this system resulted over time in significant disparities between the assessed values of similar parcels of property, the Court concluded that Proposition 13 did not violate the Equal Protection Clause. The Court explained that Proposition 13 was rationally related to the legitimate state purpose of promoting local community stability, and that the distinction it drew between established residents and more heavily-taxed newcomers could be justified on the ground that the newcomers did not have a vested expectation interest in any existing level of property assessments.

The Court went to some lengths to explain why this result was fully consistent with its unanimous holding three years earlier in *Allegheny Pittsburgh*. As the Court

noted, "an obvious and critical factual difference between this case and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme." 112 S.Ct. at 2334. The West Virginia Constitution and statutes, the Court noted, required property to be assessed not on the basis of acquisition value, as in California, but on the basis of " 'estimated market value' ". *Id.* (quoting *Allegheny Pittsburgh*, 488 U.S. at 345). For that reason, the policy purposes invoked to justify the disparities in California could not have been valid purposes in the West Virginia case, because this Court's equal protection jurisprudence "require[s] that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 112 S.Ct. at 2334 (citation omitted).

The point here is *not* that the Webster County assessor's practice violates West Virginia law, although it does. The point is instead that in considering whether the unequal tax treatment inherent in the assessor's use of a flat rate violates equal protection under the Federal Constitution, the Court asks whether the discrimination rationally serves a legitimate state purpose. The Court in *Nordlinger* was able to consider a variety of purposes served by the discrimination under the California system, because the system itself did not require assessment on the basis of current value. As the Court itself noted, however, the situation in West Virginia was "obvious[ly] and critical[ly]" different. There the assessments were required to be on the basis of current value, so no purpose apart from attaining current value could be a legitimate state purpose in applying equal protection analysis.[2]

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[2] Counsel for respondent acknowledged below that the Court's decision in *Nordlinger* "in no wise affects, alters, or modifies its holding in *Allegheny Pittsburgh* as applied in here." Transcript of Hearing, Circuit Court of Webster County, at 23 (July 17, 1992).

The pertinent statutes and provisions of the West Virginia Constitution have not changed since the time *Allegheny Pittsburgh* was decided. It therefore remains the case that purposes apart from attainment of current value cannot be invoked to justify an assessment system in West Virginia. A flat, uniform appraisal and assessment system is the antithesis of an effort to arrive at current market value. The disparities in tax burden inherent in the Webster County system therefore cannot be justified as rationally related to a legitimate state purpose, and that system is invalid under the Equal Protection Clause. *Cumberland Coal, supra.*

The court below sought to buttress its conclusion by noting that the flat rate system made it easier for certain individuals to pay their property taxes. As the court explained, applying a market value to coal property would cause "problems" for individual owners, "because some individuals are not in a position, in terms of ability to pay and the ability to benefit from tax write offs, that individuals or corporations are entitled to by virtue of the fact that they're in the business and many of the taxes that are assessed are written off against other taxes and other expenses." App. 33a. The court concluded that "the approach by the assessor does take into consideration, in my opinion, the ability of some taxpayers to pay taxes." *Id.* at 34a.

This Court's opinion in *Allegheny Pittsburgh* confirms the fallacy in the lower court's reasoning. The disparities in tax burden that result from the Webster County assessor's approach cannot be justified on the basis that the flat rate system takes into consideration "the ability of some taxpayers to pay taxes." As noted, the only permissible objective for an assessment system in West Virginia is taxation of property "according to its estimated market value." 488 U.S. at 345. The fact that the assessor pursued another, impermissible objective—using a flat rate to increase the tax burden on some entities (like

petitioners) while easing the burden on some individuals—highlights the lack of justification for the resulting discrimination.

The court below also sought to justify its decision by focusing on the relationship between the flat appraised and assessed values, on the one hand, and the actual market value of the coal property, on the other. As the court put it, "[t]he issue gets back to how much that coal was worth an acre." App. 29a. The court concluded that coal property was "worth more than $250 an acre, or $210, or whatever the figure is," and that therefore petitioners could not complain about the flat rate appraisal of 250 dollars per acre and the resulting assessment of 150 dollars per acre. *Id.*

This Court in *Allegheny Pittsburgh* expressly rejected such a line of reasoning the last time it was offered by Webster County. In *Allegheny Pittsburgh*, the petitioner coal companies could not and did not argue that their properties were appraised at greater than market value. The properties were, after all, appraised at the level of their recent purchase price. As this Court emphasized, however, the issue was "a comparative one." 488 U.S. at 342. The question was not whether the property was appraised at or below market value, but whether there was discriminatory treatment when the companies' "allocable share of the total property tax burden" was compared "with the share of others similarly situated relative to their property holdings." *Id.* at 346. So too here the question is not whether coal property is worth more or less than the flat assigned value of 250 dollars per acre, but instead the comparative question of whether there is discrimination inherent in a system that assigns the same flat value to valuable property containing mineable seams of coal and to practically worthless property that is mined out, barren, or unmineable.

The decision below flouts this Court's decision in *Allegheny Pittsburgh*. As this Court explained in that case,

the problem was that the Webster County assessor had intentionally adopted an assessment system that bore no relation to current market value. As this Court noted:

> "[T]he assessor did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate. The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon [neighboring] properties." Nor were they "based upon present use or immediately foreseeable economic development of petitioners' real estate." [488 U.S. at 340 (quoting Circuit Court opinion).]

In response, the Webster County assessor has again adopted a system that bears no relation to current market value. As the assessor testified, he once again declined to consider the presence or absence of mineable coal, particular features of particular parcels, or any other individual characteristics affecting value. *See supra* at 4-5. And once again the resulting disparity in tax burdens—a comparison of the taxpayer's share of the tax burden "with the share of others similarly situated relative to *their* property holdings"—bears no relation to current market value, and therefore does not pass muster under the rational relation test as applied in *Allegheny Pittsburgh*.

The Webster County Commission below could not and did not attempt to defend its flat rate appraisal and assessment system as being rationally related to the purpose of assessing property on the basis of current market value. In fact, the Commission candidly recognized the inequity in its approach: "While the weighted average system may be unfair to those class of taxpayers who do not have the coal, it is a terrific bargain for those who have a considerable amount of coal." Memorandum of Law and Brief of Argument on Behalf of County Commission of Webster County at 3-4, In re: 1990 Tax Assessment

Cases, Circuit Court of Webster County (Feb. 26, 1992). In other words, the system is arbitrary, and is not based on the actual value of particular parcels.

The County's principal contention is that its practice is a transitional mechanism of a sort recognized in *Allegheny Pittsburgh*. The Circuit Court agreed, noting that "there may be some transitional inequality here, but the Court is of the opinion that the assessor is not in a position to obtain substantial equality in one year." App. 22a.

A flat rate system that has been in effect for the past three years, however, bears no relation to the transitional mechanism discussed in *Allegheny Pittsburgh*. The Court in that case was explaining that a reappraisal of the market value of all properties was not required every tax year. Instead, "a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command." 488 U.S. at 343. The Commission's current flat rate system is not an effort to adjust assessments of properties that have not been recently appraised —the situation discussed in *Allegheny Pittsburgh*—but the exact opposite of any effort at individual appraisal.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS

Contrary to the decision below, other state courts applying *Cumberland Coal* and *Allegheny Pittsburgh* have recognized the violation of equal protection principles inherent in applying a flat appraised value to properties of differing values, under a system in which assessments are to be based on actual value. For example, the decision below conflicts directly with the recent decision of the Supreme Court of Hawaii in *City and County of Honolulu* v. *Steiner*, 834 P.2d 1302 (Hawaii 1992). That case involved the assessment of beach-front property in Hawaii. The assessor arrived at a benchmark value for beach-front property in a specific area, and then applied an "overage formula" to the benchmark to determine the

assessment of specific parcels. The same benchmark and overage formula were applied to rocky, inaccessible beach-front property as to level, usuable beach-front property, and Steiner—an owner of the former type of property—challenged the assessment under the Equal Protection Clause of the Fourteenth Amendment.

The state supreme court ruled unanimously that the assessor's practice violated the Federal Constitution. *Id.* at 1313. The court found unconstitutional discrimination in the fact that "the City used the same overage formula for unbuildable, rock-strewn acreage with no beach access as it did for level, usable Kahala Beach beach-front acreage," concluding that "fairness requires the assessment of Steiner's acreage at a lower percentage of benchmark than Kahala Beach acreage, because each has significantly different characteristics affecting value." *Id.* The court noted that its conclusion was buttressed by the fact that the assessor's practice was "in contradiction of its own assessment guidelines." *Id.* As the court explained, "[w]hen the assessors follow department guidelines, there is a much greater likelihood that the tax burden will be equally shared by all taxpayers." *Id.* at 1310 (citing *Allegheny Pittsburgh*, 488 U.S. at 345).

The parallels to the present case are plain. Just as in *Steiner* the assessor applied the same overage formula to beach-front property that was rocky, inaccessible, and unbuildable as to beach-front property that was level and usable, so too here the Webster County assessor applied the same flat rate to mined out, barren coal property as to coal property with mineable and merchantable seams. And just as in *Steiner* the assessor failed to follow published assessment guidelines, so too here the Webster County assessor failed to follow the West Virginia *Guide for Assessors*. *See supra* at 5. The Hawaii Supreme Court, citing *Allegheny Pittsburgh*, recognized that such a practice violated the Federal Constitution; the court

below reached the opposite result. This Court should grant the writ to resolve the conflict.

To cite another example, *Orchard Gardens Country Club, Inc.* v. *Commissioner of Revenue*, 294 N.W. 2d 701 (Minn. 1980), involved the assessment of golf course property. The Minnesota Supreme Court—citing *Cumberland Coal*—struck down an assessor's practice of assessing all such property at a flat rate. The Minnesota court explained that "by placing an arbitrary value on all lands used for golf courses, the more elaborate and sophisticated golf courses would bear an artificially lower share of the tax burden while the less elaborate course must pay a higher share. * * * [This] is tantamount to the adoption of an arbitrary yardstick of valuation * * *." *Id.* at 704. That is, of course, precisely the situation here: coal property with merchantable coal seams carries an artificially lower share of the tax burden, while coal property that is mined out or barren pays a higher share.

The Mississippi Supreme Court also recently applied *Cumberland Coal* and *Allegheny Pittsburgh* in a manner that conflicts with the decision below. In *Rebelwood, Ltd.* v. *Hinds County*, 544 So. 2d 1356 (Miss. 1989), the taxpayer—a federally subsidized low-income housing complex—claimed that the state property tax assessor discriminated against it vis-à-vis other, non-subsidized complexes by including the value of the federal subsidies in arriving at the assessment for the taxpayer's complex. Citing *Cumberland Coal* and *Allegheny Pittsburgh*, the state supreme court rejected the claim. The court noted there were two types of assessment discrimination. The first consisted of applying different assessment ratios to similar property, not an issue here.

> The second form of assessment discrimination has been at once more subtle and blatant—and more difficult to detect and correct. We refer to discrimination in the assignment of true value—before the assessment ratio is ever applied. *Where properties,*

> *superficially similar but in fact having widely varying true values, are assigned the same true value, this form of discrimination occurs.* [544 So. 2d at 1366 (emphasis supplied).]

Because the assessor "consider[ed] all factors affecting the value of the property," *id.*, including the federal subsidy, there was no discrimination.

Here the Webster County assessor expressly refused to consider the particular characteristics of different coal properties—whether they were mined out, barren, or actually being mined—and instead assigned the same flat rate to properties "superficially similar but in fact having widely varying true values." As the Mississippi Supreme Court explained, such an approach results in a violation of equal protection. *See also Welch* v. *Town of Ludlow*, 385 A.2d 1105, 1108 (Vt. 1978) ("An inflexible formula that fails to take into account these various factors [such as "the availability of the property, its use * * *, any functional deficiencies, and all other elements * * * which combine to give property a market value"] cannot be employed as the sole basis for an appraisal."); *Snider* v. *Limbach*, 542 N.E. 2d 647, 649 (Ohio 1989) (assessment formula "must be adjusted when special or unusual circumstances of use exist or when evidence shows that rigid application would be inappropriate").

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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August 11, 1993

APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of April, 1993, the following order was made and entered:

No. 930070

IN RE: WEBSTER COUNTY TAX ASSESSMENT CASES

On a former day, to-wit, January 19, 1993, came the petitioners, Western Pocahontas Properties Limited Partnership, by Huddleston, Bolen, Beatty, Porter & Copen, and Richard J. Bolen, its attorneys; Island Creek Coal Company and Western Pocahontas Properties Limited Partnership, by Callaghan & Ruckman, and Dan O. Callaghan, its attorneys; Elk Sewell Coal Company, by Robert B. Sayre, its attorney; Juliana Mining Company, Pardee & Curtain Lumber Company and The Sun Lumber Company, by Spilman, Thomas, Battle & Klostermeyer, G. Thomas Battle and B. Judd Hartman, their attorneys; and H. R. Deitz, et al., G. E. Herold Estate, Woody Lumber Company, Webster Woodlands, Inc., John D. and Helen Moore, Debra Ann Moore, William W. Talbott, et ux., David R. Moore, Charles T. Sink, et ux., Mack Wesley Carpenter, et al., T. Michael Hewitt, et al., Spring Ridge Coal Company, Webster County Lumber Company, William Christian, et al., and Joseph Fogg, et al., by William W. Talbott, their attorney, and presented to the Court their petition praying for an appeal

from a judgment on the Circuit Court of Webster County, rendered on the 21st day of August, 1992, with the record therein accompanying the petition, which being seen and inspected by the Court is hereby refused. Justice Brotherton would grant. Justice Neely absent.

A True Copy

Attest: /s/ [Illegible]
Clerk
Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT
OF WEBSTER COUNTY
WEST VIRGINIA

IN RE: 1990 TAX ASSESSMENT CASES

Civil Action No. 90-MSC-13

ELK SEWELL COAL COMPANY

vs.

WEBSTER COUNTY COMMISSION, *et al.*

Civil Action No. 90-MSC-15

ROMAN CATHOLIC DIOCESE

vs.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-16

TAX ASSESSMENT AGAINST WESTERN POCAHONTAS
PROPERTIES, 1990 TAXES

Civil Action No. 90-MSC-18

DORSEY CARPENTER AND DOLLIE CARPENTER, His Wife

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-19

CATHRYN RANDOLPH

VS.

WEBSTER COUNTY COMMISSION, *et al.*

Civil Action No. 90-MSC-21

H. R. DEITZ

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-22

PARDEE & CURTIN LUMBER COMPANY

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-22

CHARLES KELLY, *et al.*

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-23

JAMES H. WOLVERTON FOR G. E. HEROLD ESTATE

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-24

WOODY LUMBER COMPANY

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-25

THE SUN LUMBER COMPANY

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-26

JULIANA MINING COMPANY, INC.

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-27

WEBSTER WOODLANDS, INC.

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-28

DEBRA ANN MOORE

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-29

WILLIAM W. TALBOTT, *et al.*

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-30

DAVID R. MOORE

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-31

CHARLES SINK, *et al.*

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. MSC-32

JOHN D. MOORE AND HELEN MOORE

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-33

MACK WESLEY CARPENTER, *et al.*

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-34

T. MICHAEL HEWITT, *et al.*

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-35

RAY B. STUMP, JR. AND RELLA STUMP

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-36

ISLAND CREEK COAL COMPANY

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-37

EVERETT C. WOODS

VS.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-39

ARDEN E. COGAR

vs.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-42

JACK AND GENE HAYDEN

vs.

WEBSTER COUNTY COMMISSION

Civil Action No. 90-MSC-43

GENE B. HAYDEN FOR T. B. BICKEL ESTATE

vs.

WEBSTER COUNTY COMMISSION

Civil Action No. 91-MSC-13

IN RE: 1991 TAX ASSESSMENT OF EVA CARPENTER, ESTATE OF MACK W. CARPENTER, WESLEY CARPENTER, *et al.*, WILLIAM CHRISTIAN, *et al.*, HAROLD DEITZ, *et al.*, JOSEPH FOGG, *et al.*, T. MICHAEL HEWITT, *et al.*, JULIANA MINING COMPANY, INC., PARDEE & CURTIN LUMBER COMPANY, JOHN D. MOORE, *et ux.*, DEBRA ANN MOORE, CHARLES T. SINK, *et ux.*, SUN LUMBER COMPANY, WILLIAM W. TALBOTT, *et ux.*, OAKLAND HOTEL, INC., *et al.*, WEBSTER WOODLANDS, INC., DAVID R. MOORE, WOODY LUMBER COMPANY, and JAMES H. WOLVERTON FOR ESTATE OF DANA HEROLD

Civil Action No. 91-MSC-15

IN RE: 1991 TAX ASSESSMENT OF OAKLAND HOTEL, INC., MICHAEL PAYNE, a/k/a OAKLAND ENTERPRISES, INC.

Civil Action No. 91-MSC-16

IN RE: 1991 TAX ASSESSMENT AGAINST ISLAND CREEK COAL COMPANY

Civil Action No. 91-MSC-17

IN RE: 1991 TAX ASSESSMENT AGAINST WESTERN POCAHONTAS PROPERTIES, INC.

Civil Action No. 90-MSC-19

IN RE: 1991 TAX ASSESSMENT OF EVERETT C. WOODS

Civil Action Nos. 92-MSC-13, 92-MSC-14

IN RE: 1992 TAX ASSESSMENT OF EVA CARPENTER, ESTATE OF MACK W. CARPENTER, MACK WESLEY CARPENTER, *et al.*, WILLIAM CHRISTIAN, *et al.*, HAROLD DEITZ, *et al.*, JOSEPH FOGG, *et al.*, T. MICHAEL HEWITT, *et al.*, JULIANA MINING COMPANY, INC., PARDEE & CURTIN LUMBER COMPANY, JOHN D. MOORE, *et ux.*, DEBRA ANN MOORE, CHARLES T. SINK, *et ux.*, SPRING RIDGE COAL COMPANY, SUN LUMBER COMPANY, JOSEPH B. TALBOTT, *et ux.*, WILLIAM W. TALBOTT, *et ux.*, OAKLAND HOTEL, INC., *et al.*, WEBSTER WOODLANDS, INC., DAVID R. MOORE, WOODY LUMBER COMPANY, and JAMES H. WOLVERTON FOR ESTATE OF DANA HEROLD

Civil Action No. 92-MSC-15

ISLAND CREEK COAL COMPANY,
Petitioner,

VS.

WEBSTER COUNTY COMMISSION,
Respondent.

Civil Action No. 92-MSC-16

WESTERN POCAHONTAS PROPERTIES
Petitioner,

VS.

WEBSTER COUNTY COMMISSION,
Respondent.

Civil Action No. 92-MSC-17

WEBSTER COUNTY LUMBER COMPANY, *et al.*,
Petitioner,

VS.

WEBSTER COUNTY COMMISSION,
Respondent.

Civil Action No. 92-MSC-20

ROMAN CATHOLIC DIOCESE, *et al.*,
Petitioners,

VS.

WEBSTER COUNTY COMMISSION,
Respondent.

ORDER

The above matters came on to be heard on the 17th day of July, 1992 upon the notice by the respondents County Commission, et al. that it would move on this date for dismissal of the petitions heretofore filed by the petitioners.

The Court then called upon counsel of the parties to announce appearances. Pursuant to the request of the Court Ernest V. Morton, Jr., Prosecuting Attorney of Webster County and as such statutory attorney for the respondent County Commission of Webster County and any other officers who may have been named as respondents, announced to the Court that he was appearing for the respondents in the following cases:

Elk Sewell Coal Company, 90 MSC-13
Roman Catholic Diocese, 90-MSC-15, 90-MSC-20
Western Pocahontas Properties, 90-MSC-16, 91-MSC-17, 92-MSC-16
Dorsey Carpenter & Dollie Carpenter, 90-MSC-18, 91-MSC-20, 92-MSC-20
H.R. Dietz, 90-MSC-21, 91-MSC-13, 92-MSC-13
Charles Kelley, et al., 90-MSC-22
Woody Lumber Company, 90-MSC-23, 91-MSC-13, 92-MSC-13
Debra Ann Moore, 90-MSC-28, 91-MSC-13, 92-MSC-13
John D. Moore & Helen G. Moore, 90-MSC-32, 91-MSC-13, 92-MSC-13
Eva Carpenter, Estate of Mack W. Carpenter, Mack Wesley Carpenter, 90-MSC-33, 91-MSC-13, 92-MSC-13
T. Michael Hewitt, et al., 90-MSC-34, 91-MSC-13, 92-MSC-13
Ray B. Stump, Jr. & Rella Stump, 90-MSC-35
Island Creek Coal Company, 90-MSC-36, 91-MSC-16, 92-MSC-15

Arden E. Cogar, 90-MSC-39
William Christian, 91-MSC-13, 92-MSC-13
Joseph Fogg, 91-MSC-13, 92-MSC-13
Spring Ridge Coal Company, 91-MSC-14, 92-MSC-13
Oakland Hotel, Inc. & Mike Payne, 91-MSC-15, 92-MSC-13
Webster Co. Lumber Company, 92-MSC-17

Mr. Morton also announced to the Court that Gregory A. Tucker was present, he being the Prosecuting Attorney of Nicholas County, West Virginia appointed as Special Prosecuting Attorney of Webster County for these cases and that Mr. Tucker was appearing on behalf of the respondent Webster County and such other officials as may have been named in the following cases:

Pardee & Curtin Lumber Co., 90-MSC-22, 91-MSC-13, 92-MSC-13
James H. Wolverton for G.D. Herold Estate, 90-MSC-23, 91-MSC-13, 92-MSC-13
The Sun Lumber Company, 90-MSC-25, 91-MSC-13, 92-MSC-13
Juliana Mining Company, Inc., 90-MSC-26, 91-MSC-13, 92-MSC-13
Webster Woodlands, Inc., 90-MSC-27, 91-MSC-13, 92-MSC-13
William W. Talbott & Brenda Talbott, 90-MSC-29, 91-MSC-13, 92-MSC-13
David R. Moore, 90-MSC-30, 91-MSC-13, 92-MSC-13
Charles T. Sink, et ux, 91-MSC-31, 91-MSC-13, 92-MSC-13
Everett Woods, 90-MSC-37, 91-MSC-19
Jack Hayden & Gene Hayden, 90-MSC-42
Gene Hayden for T. B. Bickel Estate, 90-MSC-43

James J. Alex, Special Assistant Attorney General, also appeared on behalf of the State of West Virginia Depart-

ment of Tax and Revenue in Case No. 92-MSC-17, and any other cases involving managed timberland.

Herschel H. Rose, III announced that he was appearing on behalf of the Board of Education of the County of Webster in all cases.

Howard J. Blyler announced that he was appearing for the Roman Catholic Diocese and Dorsey Carpenter and Dollie Carpenter in the cases enumerated and set forth above.

Mr. Robert Sayre appeared and announced that he was appearing on behalf of Elk Sewell Coal Company in Civil Action No. 90-MSC-13 in lieu of G. Berk Lynch by reason of the fact that he and other parties had acquired an interest in the petitioner. Mr. Sayre also announced to the Court that Dan O. Callaghan would be further representing the petitioner Elk Sewell Coal Company.

Dan O. Callaghan announced that he was appearing on behalf of Island Creek Coal Company, Western Pocahontas Properties and Elk Sewell Coal Company in the aforementioned cases.

Mr. William W. Talbott announced that he was appearing as counsel for all of the other petitioners except those who had noted an appearance pro se.

Dana L. Lynch, as Assessor for Webster County, also appeared.

None of the members of the County Commission of Webster County appeared personally.

The Court noted that petitioners Ray B. Stump, Jr., et ux, Civil Action No. 90-MSC-35, Arden E. Cogar in Civil Action 90-MSC-39, Everett C. Woods in Civil Action No. 90-MSC-37 and 91-MSC-19, Jack & Gene Hayden in Case No. 90-MSC-42 and Gene Hayden for T.B. Bickel Estate in 90-MSC-43 had filed their petitions heretofore and appeared pro se. Mr. Ray Stump appeared on

his own behalf this day but none of the other pro se petitioners appeared.

Mr. Talbott then called to the Court's attention that at the hearing on April 14, 1992, the County Commission sitting as a Board of Equalization and Review had announced to the Court that it considered the appraised and assessed valuations of oil and gas to be excessive and that it offered to reduce the appraised valuation from $67.00 per acre to $16.00 per acre, and the assessed valuation from $40.00 per acre to $9.00 per acre. Mr. Talbott further stated that it was his recollection that he and others had accepted the offer.

Mr. Morton indicated that he did not recall any of the parties having accepted the same, but that the County Commission was willing to stand by the offer.

In consideration whereof, it is hereby ORDERED that as to oil and gas properties, whether owned separately, or as constituting part of the value of an assessment for minerals, or an assessment for surface, as to the valuation of the oil and gas, be fixed at an appraised valuation of $16.00 per acre and an assessed valuation of $9.00 per acre.

The Court hereby directs the Assessor of Webster County to compute the assessments levied against petitioners who own oil and gas at $9.00 per acre, and to relay the changed valuations to the Sheriff of Webster County and to cooperate with him in adjusting taxes due by reason of said change.

Subsequent to the hearing on July 17, 1992, the respondent County Commission of Webster County filed a motion in certain cases which had been settled and decided heretofore, and in the interest of equity and unifority moved the Court *ex parte* for the entry of an order for a similar adjustment for those taxpayers who had previously agreed to a settlement of their cases, or against whom the judgment had been rendered, and in which

cases the computation of taxes due had not yet been relayed to the taxpayers. These matters are being treated in a separate order, and apply to the following cases: Cathryn Randolph, Civil Action No. 90-MSC-19, and Edwina Bagley, Civil Action No. 90-MSC-20, both petitioners being represented by attorney Edgar Siegrist; Kelley, Elkins, Davis, Civil Action No. 90-MSC-22, represented by attorney Boyd Warner; Everett Co. Woods, Civil Action No. 90-MSC-37 and 91-MSC-19, pro se; Jack Hayden and Gene Hayden, Civil Action No. 90-MSC-42 pro se; and Gene Hayden for T.B. Bickel Estate, Civil Action No. 90-MSC-43, pro se.

Mr. Alex renewed his motion heretofore made as to property owners who are participating in the managed timberland project, but indicated to the Court that he did not have a list of all such taxpayers. Mr. Talbott advised the Court that some of his clients might be in that category but he had not received information from Mr. Alex as to which taxpayers his motion was directed.

The Assessor advised both Mr. Alex and Mr. Talbott that he would review his files and would indicate to each of them which other taxpayers involved in these appeals has subscribed to the managed timberland program.

Mr. Alex and Mr. Talbott then proceeded to argue his motion.

Upon being requested to do so by the Court, Mr. Morton stated into the record the motion of the respondents for the dismissal of those petitions not heretofore decided or agreed upon, and that the petitioners be denied the relief sought by the said petitions.

Mr. Tucker adopted the position of Mr. Morton as to the cases in which he was appearing for the respondents.

The motions were discussed by and among the parties and the Court.

The Court then announced that it had duly considered of the arguments of the parties presented at the hearings on April 14, 1992, and the briefs filed in these matters and was prepared to make a decision.

For reasons set forth by the Court in the announcement of his decision, a transcript of which is attached hereto and made a part of this record, the Court is of the opinion that the motion of the respondents should be, and it is hereby, SUSTAINED.

Mr. Alex inquired of the Court if the ruling that he had announced was applicable to the managed timberland properties and the Court advised that the provisions set forth in his decision and contained in the transcript, were applicable to those taxpayers who own managed timberland properties.

Accordingly, it is hereby ADJUDGED and ORDERED that the relief prayed for by the said petitioners be denied, and that the Sheriff of Webster County proceed with the collection of any unpaid taxes for the years 1990 and 1991, and hold the disputed amounts thereof in escrow, pending the final disposition of these cases on appeals if any such appeals be taken.

As to the year 1992 it is further ADJUDGED and ORDERED that the Sheriff shall proceed to collect the taxes in full, except as they may be modified by order of this Court as to the valuation of oil and gas, and that if these cases are not fully decided upon appeal by that time, that he hold any disputed amounts in escrow.

The petition of Ray B. Stump, Jr. and Rella Stump is hereby excepted from the aforesaid ruling of the Court. It appearing to the Court that the evidence before the Board of Equalization and Review was to the effect that although the petitioners were assessed with coal as underlying their property, the State of West Virginia by its Department of Natural Resources had denied to said petitioners a permit to mine the coal for reasons set forth

therein. It appearing to the Court that for the State to deny the said petitioners the right to mine the coal, and yet let the County and State benefit from the collection of taxes thereon, would create an inequitable situation.

Accordingly, it is hereby ADJUDGED and ORDERED that the valuation of the taxes on the coal underlying the property of the petitioners Ray B. Stump, Jr. and Rella Stump be reduced for the years, 1990, 1991 and 1992 from $150.00 per acre to $5.00 per acre.

It is further ADJUDGED and ORDERED that the taxes owed by said petitioners Ray B. Stump, Jr. and Rella Stump be recomputed in the light of the Court's decision and collected by the Sheriff of Webster County in the adjusted amount.

To the action of the Court in distinguishing and ruling separately on the case of petitioners Ray B. Stump, Jr. and Rella Stump, all the other petitioners appearing objected and excepted.

Mr. Morton then brought to the attention of the Court that certain other taxpayers, who did not have appeals pending in this Court, to-wit: Ernestine Trent, Ottaway Trent, Woodrow Trent, Mildred Blankenship, Barbara Wheeler, Hassell Blankenship, Upper Elk Coal Company, Wolfpen Knob Development Company, W.L. Thomas, Dorothy Giles, Coastal Lumber Company and Roger Hall had withheld part of their tax payments by reason of the orders of this Court entered in the matter of petitions pending in this Court by the petitioners, and advised the Court that, pursuant to notice dated the 29th day of June, 1992, he had served notice on said taxpayers that the County Commission would on the 17th day of July, 1992 move for the entry of an order.

The Court notes that in the cases of Western Pocahontas Properties, 90-MSC-16, 91-MSC-17 and 92-MSC-16, and Island Creek Coal Company, 90-MSC-36, 91-MSC-16 and 92-MSC-15, an order covering the pro-

ceedings and the ruling of the Court at the hearing on June 5, 1992 had been endorsed by all counsel of interest and presented to the Court for entry.

On motion of Mr. Callaghan, the Court agreed to withhold entry of the order covering its ruling in the aforesaid cases involving Western Pocahontas Properties and Island Creek Coal Company until the entry of this order covering the proceedings on July 17, 1992 so that there will be a uniformity in the commencement of the running of time in which the various and sundry petitioners interested in doing so may perfect an appeal.

Mr. Rose then presented to the Court the motion of the Board of Education for the payment to the Board its proportionate share of all tax moneys held in escrow which motion the Court overruled. Mr. Rose then indicated that the Board would desire to appeal the adverse ruling of the Court on his motion.

The Court then directed Mr. Rose to prepare and submit to the Court a separate order covering that portion of the proceedings held in this matter on the 17th day of July, 1992.

Mr. Tucker suggested on the record the death of Everett C. Woods and moved that Carolyn Sue Riffle as Executrix of his estate be substituted as party petitioner in his stead, which motion the Court sustained.

ENTER this 21st day of August, 1992.

/s/ Danny O. Cline
DANNY O. CLINE
Judge

APPENDIX C

IN THE CIRCUIT COURT
OF WEBSTER COUNTY
WEST VIRGINIA

IN RE: 1992 TAX ASSESSMENTS

The following is a transcript of proceedings had in the above-styled case before the Honorable Danny O. Cline, Judge, of said Court, in open court, in the County of Webster, in the Town of Webster Springs, State of West Virginia, on the 17th day of July, 1992, a regularly scheduled Motion Day.

* * * *

[3] July 17, 1992

BE IT REMEMBERED that the following proceedings were had in open court, the parties being represented by counsel, to-wit:

* * * *

[82] THE COURT: Is there anything else?

With reference to these various tax matters, this Court is of the opinion and finds that the [83] assessor of Webster County was previously directed as a consequence of the proceedings had in Alleghany Pittsburgh cases—those cases that commenced in 1975 and continued until 1984, or whenever it was. As a consequence of the order that I entered in those cases the assessor was directed and ordered by the Court to cause the assessments to be equalized. Of course, my decision was appealed to the state supreme court which reversed me. That decision was

appealed by the taxpayers to the United States Supreme Court, which reversed the state supreme court and had the effect of reinstating the decision that I had made.

In response to the decision of the United States Supreme Court, this has been previously argued before this Court by counsel on behalf of the county commission. The assessor undertook to carry out the Court's order to secure uniformity and equality in the assessment. The law does not require absolute equality in the real estate tax assessments or taxes. There will be—and I believe that all Courts recognize that there will be occasional inequality. It will not be exactly correct at any time, but substantial equality is [84] required.

The assessor in this instance has used a weighted average according to his explanation, or at least according to the argument made by counsel on his behalf, as I recall it. It's been a couple of months since that argument was made. And the Court is of the opinion that that method of attempting to secure uniform and equal assessments is not constitutionally unsound under the circumstances. There may be some transitional inequality. The coal properties, as I understand it, were appraised at $210—or a figure in that vicinity—and were assessed at $150. Of course, there was considerable argument with reference to the value of coal property and basically the argument was made particularly with reference to properties that contained some areas where there was coal—and some areas where there wasn't coal. The argument was made that those areas where the coal did not—or proven reserves were shown not to exist, that there should be no assessment and the balance should be assessed at $150 per acre.

The assessor's position in making the assessments that are now and have been questioned [85] was to attempt to obtain equality consistent with the Court's order previously entered by using a weighted average until the reevaluation being undertaken by the state tax commissioner's office could be fully implemented. Under the con-

ditions that existed during the period when the Alleghany Pittsburgh cases and the Oneida case—those cases were in litigation—the discrepancy between the assessments was very substantial. Some coal properties were being assessed at $5 an acre, others at $15, $25, $50, $75, $35. And we had three or four taxpayers who were being assessed at $3500, and some at $360, and $710, and so forth. And, of course, that was the basis for this Court's decision that you could not assess those lands at that figure and say that an arms length transaction was going to be applied. But we were going to wait until another arms length transaction occurred before anyone else was raised. There was some raising of taxes, but it was minimal. I concluded that that was in violation of the Uniform and Equal Provisions of the Constitution. And I am of that opinion today. I don't believe, however, that decision requires absolute uniformity.

[86] This Court is of the opinion that there may be some transitional inequality here, but the Court is of the opinion that the assessor is not in a position to obtain substantial equality in one year. He was mandated by order of the Court to take action to secure equality in the assessments. And that is what he undertook, after receipt of the decision of the United States Supreme Court. And this Court is of the opinion that the method used in that instance was a proper method to attempt to carry out the responsibility of his office. I am aware that the state tax commissioner does have overall supervisory authority of the assessors throughout the state. And our Court recognizes that the matter of valuation of property is the responsibility; that is the West Virginia Supreme Court of Appeals has recognized in cases that it has decided that the state tax commissioner has the responsibility for making appraisements of real estate in the State of West Virginia. And the assessor has the responsibility of making assessments.

With reference to the statute and with reference to the implementation of plans not [87] approved by the state

tax commissioner, I don't know that the assessor, in this instance, was obligated to go to the state tax commissioner and attempt to secure from the state tax commissioner some sort of a plan to be implemented by him. The assessor in this instance was acting in response to an order of the Court. And although that I recognize the state tax commissioner's responsibility and duty to assist and provide services to and on behalf of the various assessors in the State of West Virgina, the court is of the opinion that the statutory duty and the statutory language does not preclude an assessor from attempting to carry out an order of a court of competent jurisdiction to obtain equality and uniformity in the assessment of real estate taxes. The assessor was in this instance acting under an order that directed that he obtain and equalize the taxes. The fact that there is now in the process of being implemented a phase-in period to obtain equality, which is under the direction of the state tax commissioner. That, I feel, is probably something that we've needed in the state for a number of years. But the duty and the [88] responsibility of the State Tax Commissioner's office, I don't believe, would prohibit or make illegal, or in any way impair the action of the assessor in this instance in attempting to carry out the Court's order.

The Court is of the opinion and concludes from the evidence that the argument made on behalf of the respondents, there is a duty and a responsibility to equalize. The constitution of the state and the statute recognizes that the real estate taxes should be uniform and equal. There is not any question that the assessment is presumed to be correct. And in this instance, although, a considerable argument has been made that there is—or that the assessments that were made should be lowered or altered. There was a lack of evidence to show what the protested property, that there is a lack of evidence on part of the protesting taxpayers to show what the property in question was actually worth. The argument, basically, was that the property was assessed too high and

that it should be reduced. There wasn't evidence offered on behalf of the protesting taxpayers to show what the value of coal was. [89] There was not evidence offered to show what the value of unmanaged timberland per acre was, that I recall. There was not evidence offered to show the value of unimproved land. The basic argument was that the assessment was wrong.

The Court accordingly concludes that the relief prayed for by the various protesting taxpayers should be denied. With reference to those instances, however, in which the State of West Virginia by and through its agencies enters orders enjoining individuals from realizing the benefit of mineral interests; that is, if the Department of Natural Resources enters orders that prohibit an individual from realizing the benefit of mineral interest, then it appears to me that the state is in an inequitable position to tell the taxpayer that he is required to pay the same tax on his mineral interest as is required to be paid by the taxpayer who has the benefit of receiving, or has the right to receive a benefit of the mineral when the same is extracted. If the state prohibits a person from extracting the minerals that the landowner owns in the ground, if the state prohibits him from realizing any benefit from it [90] then it appears to me that the state is also prohibited from treating that as a valuable commodity that is entitled to assessment at full value and on an equal footing with coal interest. For instance, of other individuals who are entitled to mine their particular coal.

Is there anything further?

MR. MORTON: Your Honor, I have a question as to the last remarks of the Court. Would it be fair to assume that the ruling of the Court be that particular taxpayer—I assume you're talking about Mr. Stump—his taxes would be assessed at the rate established by the state tax commissioner for unmineable coal?

THE COURT: Yes, sir, it would.

MR. MORTON: Okay. And am I correct in assuming that the decision of the Court goes also to the surface and improvements thereon as made by the assessor as well as coal?

THE COURT: Yes, sir.

MR. MORTON: And may I submit an order then in that connection holding that by agreement the oil and gas appraisement and assessment would be reduced to $16 and $9, respectably?

[91] THE COURT: Yes, sir.

MR. TALBOTT: Let me get one thing straight. Mr. Morton, you indicated that the order would reflect the assessments on unimproved surface land to reflect that which the tax commissioner recommends?

MR. MORTON: No, Your Honor. No, Mr. Talbott.

MR. TALBOTT: Okay.

MR. MORTON: I'll address the Court. My question was that I'm assuming that your order as to Mr. Stump's case would be that his minerals would be classified as unmineable and would be evaluated, appraised and assessed according to the state tax commissioner's guidelines on unmineable coal?

THE COURT: Yes, sir.

MR. MORTON: That's Mr. Stump's case.

THE COURT: If the State of West Virginia says that Mr. Stump can't mine his coal, and he is enjoined from mining his coal, he really doesn't have coal that is worth anything.

MR. MORTON: And my other question would be; what Mr. Talbott inquired about was that [92] the ruling of the Court at this time applies also to the protest filed by the various people who filed these petitions. And it would apply also to their unimproved surface, and also to the improvements, which were likewise appraised and assessed by the assessor?

THE COURT: Yes, sir.

MR. MORTON: That were upheld?

THE COURT: Yes, sir.

MR. MORTON: Thank you.

MR. ROSE: Your Honor—

MR. BLYLER: Your Honor.

THE COURT: Yes, sir.

MR. BLYLER: Just a point of clarification. Is it the Court's order that in the specific case of Mr. Stump, where he has an order from the state not to mine this coal, that he is in effect being treated as not having coal on this property; whereas a taxpayer who has no coal on this property but does not have an order from the state that says he cannot mine this property, must still pay tax on that property when there is no coal there?

MR. MORTON: If the Court, please, Mr. [93] Stump appeared and presented evidence to that effect before the county commission. It shows in the record.

THE COURT: Right.

MR. MORTON: The other taxpayers did not.

MR. TALBOTT: I want to—

THE COURT: Just a minute. Mr. Blyer, with reference to the issue of assessing the property where there is some coal and there are areas where some of the coal has been mined out. I don't know whether you recall the argument that was made. And there was a considerable amount of discussion with reference to what the true and actual value of an acre of coal was. I don't believe that anyone would assert or contend that the value of an acre of coal is $210 or $300. It is worth more than that.

MR. BLYLER: Your Honor, I'm not saying that—

THE COURT: Well, I understand. Your question is, whether people who own coal and parts of it—part of the land has coal on it and part of it doesn't have coal on it.

[94] MR. BLYLER: Yes. Where there are no mineable reserves.

THE COURT: If the assessor's methodology in response to the Court order was to use a weighted average.

And I believe that as a transitional tool is a proper way to begin to achieve equality and uniformity. He is entitled under the cases—and I believe if you'll examine them you'll find out that the decisions bear me out on this—he's entitled to begin sometime to attempt to obtain uniformity and equality. That is not something that can always be accomplished in one tax season. Sometimes it takes more than that. Sometimes it will take a period of time. And the law recognizes that he should be afforded some time to accomplish this.

It is my impression from the argument made in this instance that the state tax commissioner is finally taking an interest in seeing that real estate assessments are made uniform and equal. And that the tax system will placed upon a basis where uniformity is obtained. The rationale used by the assessor, as explained in argument before the court, was a weighted average was used and [95] recognized that some of the land might have coal that had been previously mined. But other seams of coal had not been previously mined. I believe that the state tax commissioner's assessment, or assessing practice, had been considered one seam of coal, while some land is underlaying by several seams of coal. And, of course, if you take an acre of land and measure it from the top of the surface to the center of the earth, there might be a considerable amount of coal that is underneath the surface.

The Court is of the opinion that as a transitional methodology to obtain equality that that is a proper method. There may be instances in which individuals who own coal land where some of the coal had been mined and removed, and some it had not been mined and removed. I believe that they are not entitled to insist that they be assessed $150 per acre only for those acreas that are underlaying with coal. The assessor was—anymore than they can be assessed $15 an acre for coal as the previous practice, or $50, $75. While other individuals were being assessed at $3500, or $2500 an acre.

[95] The Court is of the opinion there has to be an attempt to obtain equality. Hopefully, the state tax commissioner will prepare evaluations that permit the taxpayers to pay a reasonable amount of taxes and not overburden any taxpayer. But will not leave the residents of the State of West Virginia and the various counties in a situation of where there are always destitute, or some of them are destitute because some taxpayers pay no taxes.

MR. BLYLER: Your Honor, I'm not questioning the uniformity and equality aspect of the Court's opinion. I'm not questioning the Court's opinion at all. But I just want to understand if Mr. Stump, or any other taxpayers who presented evidence, that they are prevented from mining their coal because an order of the state, they are therefore treated differently; that would be because their coal, their property has no value because they cannot mine it by order of the state. And there the Court is getting into the question of value, because there is no coal there that can be effectively mined by order of the state. And by the same token individuals who have no coal under their property have no value there. Whether there [97] is an order of the state or not. That was my only question, Your Honor.

THE COURT: Mr. Blyler, it would be inequitable for the tax commissioner, and the assessor, here, and the county commission to insist on behalf of the State of West Virginia, that a taxpayer who is enjoined by the State of West Virginia, for mining coal; it would be inequitable for the state to insist that he pay taxes as though he had mineable coal if the state enjoins him from mining that coal.

MR. BLYLER: I agree with that, Your Honor.

THE COURT: Now, with reference to the argument that you make, I don't know whether your clients—I don't believe they did—produced core samplings, or the results of core drilling to show that there is no coal on the property. I don't remember that that argument was made. There was an argument made by Mr. —

MR. BLYLER: Well, Your Honor, all of the evidence as to all of the clients, as to all of the protesters is all in the case.

THE COURT: Okay.

[98] MR. BLYLER: Whether my clients specifically made it or not, would make no difference for purposes of the Court's order.

THE COURT: Well, it would make a difference for the purpose of the Court's order. Mr. Callaghan presented the argument with reference to tracts, some of which had coal, some of the coal had been mined and removed. And some of the coal was still under the land. The issue gets back to how much that coal was worth an acre. And for someone to say that an acre of coal was worth $250, you know. As the common saying, get real. You know, it's worth more than $250 an acre, or $210, or whatever the figure is. But the assessor's position in attempting to carry out the court order was to use this as a transitional tool. And he applied it to the acreage. He did not and his argument was that he did not have the personnel or the ability to go out and examine each and every tract of land in the county to arrive at a figure; that he was responding to the court's order. And it is a transitional thing. He relied on other information that it was available to him. With reference to tracts that are in the county; of [99] course, if you read the cases there is a responsibility. That the cases so hold, that if a person asserts that there is no coal under the land, of course, I think the cases say that he has an obligation to prove it. Or that used to be the law. I assume that it still is. And Mr. Callaghan had clients who offered evidence that the coal had been mined out. But you get back to the question, "Well, how much is an acre of coal worth?" And that gets back to the further argument that the only evidence that was offered was on the issue of value was the evidence offered by the assessor. There wasn't evidence offered or argued on behalf of the taxpayers that

an acre of coal was worth less than what it was being assessed for. That argument wasn't made.

With reference to the case of Mr. Stump, that was the only case that I heard mentioned where the department of natural resources, or a state agency, entered an order that prohibited him from mining coal. Well, if he has a state order that prohibits him from getting a permit to have his coal mined because it's too acidic, or for whatever reason; the question is, "Well, does he have mineable [100] coal?" Well, if the state says that he can't mine it then it's obviously not mineable. As I understood the argument the entire acreage was treated by the state as not being mineable and I don't believe that it would be equitable for the state to insist that it not be mined and still insist that it be taxed as though it were mineable. The positions are inconsistent. And that's the basis for my decision.

* * * *

APPENDIX D

IN THE CIRCUIT COURT
OF WEBSTER COUNTY, WEST VIRGINIA

IN RE: 1992 TAX ASSESSMENTS

The following is a transcript of the Court's ruling in the above-styled case had before the Honorable Danny O. Cline, Judge, in open court, in the County of Webster, in the Town of Webster Springs, State of West Virginia, on the 8th day of June, 1992, a regularly scheduled Motion Day.

* * * *

[3] JUNE 5, 1992

BE IT REMEMBERED THAT THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT, THE PARTIES BEING REPRESENTED BY COUNSEL, TO-WIT:

THE COURT: With reference to the Western Pocahontas and the Island Creek, do the parties desire to be heard on that case beyond what has been stated today?

MR. CALLAGHAN: No.

THE COURT: I'm ready to decide some of these cases.

MR. CALLAGHAN: We have no further evidence, Your Honor, and no further argument.

THE COURT: The issue before the Court, as I understand the evidence and the transcripts in this case—disregarding the proposed settlement which the county commission rejected—the issue is whether or not the assessments as in these two cases, Western Pocahontas

properties and Island Creek Coal Company, whether these assessments, made by the assessor and approved by the board of equalization and review, violate the rights of the protesting tax payers.

I think I've already ruled on the issues [4] relative to the notice that was provided and there are various objections that were raised with reference to the notice that was provided when the increased assessment was initially proposed by the assessor.

The only issue, as I understand it, that is before the Court now, with reference to these two parcels is whether or not the taxpayers, Western Pocahontas Properties and Island Creek Coal Company, are entitled to relief from the assessment made by the assessor and approved by the board of equalization and review; the county commission.

The assessment, as laid by the assessor, is a uniform $150 per acre assessment on the number of acres that is carried on the assessor's books. The assessor has arrived at this figure, according to his testimony before the board of equalization and review. I don't recall the extent of the testimony on the 1990 case. But I read the transcripts relative to the 1990 cases, and the transcripts relative to the 1991 and 1992 cases. The evidence, I think, is basically the same.

MR. MORTON: As I recall the proceedings, Your Honor, both sides—

[5] THE COURT: Basically, the same testimony applied to all three years.

MR. MORTON: Yes, sir.

THE COURT: The Court has examined the testimony of the assessor in this instance and I've heard the argument made by counsel on behalf of the assessor; that is the prosecuting attorney, as well as the attorney for the board of education. The method applied in this instance is basically the same method that was applied by this Court in the cases that went up to the United States Supreme Court.

And, of course, I understand the problem that confronts anyone who has a mineral interest or has real estate if there is a substantial number of acres. And I don't know this, but I'm under the impression that probably the problems that arise during inflationary times are exacerbated by the assessment process. In instances in which you have taxpayers with the ability to pay $800,000, if that be the case, to procure core drilling and so forth, where you have taxpayers who have the ability to purchase coal for $5,000, or $6,000, or $7,000 per acre. This creates problems if you're going to [6] attempt to apply a market value to all coal, because some individuals are not in a position, in terms of ability to pay and the ability to benefit from tax write offs, that individuals or corporations are entitled to by virtue of the fact that they're in the business and many of the taxes that are assessed are written off against other taxes and other expenses. And an individual who owns a tract of land that has coal on it is confronted with problems.

In this instance, of course, the asesssor has testified that his response to the cases that the East Kentucky Energy case, the Allegheny Pittsburgh case and the Oneida cases, his response was to attempt to equalize the assessments. And he arrived at the method that resulted in the assessment of $150 per acre. Of course, I don't believe that anyone thinks that an acre of coal is worth only $150. There's not any question that it's worth more than $150. I don't know what coal sells for a ton, but assuming that it would sell for $20 or $30 a ton it wouldn't take many tons to have a value of $150. I expect—I don't know—a twenty-ton truck load would bring more than a $150.

[7] So, the Court is of the opinion that the method used by the assessor in this instance is not fatally flawed. The Court is of the opinion that the assessor was obligated by an Order that was entered by this Court. I did enter an Order and directed that the assessor equalize the assessments. And although that particular Order may

not have been included among—I know it wasn't included in the opinion that I had written—but it is in the file, and the cases that ultimately went up to the Supreme Court; that he was ordered by this Court to equalize the assessments.

In this instance the Court is of the opinion that his method is not fatally flawed. There may be some transitional inequality—I don't know whether there is or not—that is arising from the fact that $150 an acre, if a person has barren land—that is land that is barren of coal—that the taxpayer can come in and say, "Well, look; there is not any coal under this land and I shouldn't be required to pay taxes." Of course, the ultimate price that will be required to be paid in taxes by those who own coal interest is something that has not been finally determined. The state tax commissioner never did [8] appear in the cases that ended up in the Supreme Court. We never could get the tax commissioners to come up and become involved in them. Hopefully, the tax commissioner will take an interest in the cases we have now and the cases that will arise in other counties in the future.

But in this instance, the Court is of the opinion that the method used by the assessor in these cases; that is the Western Pocahontas Properties and the Island Creek Coal Company cases, I believe that it is a proper method during a transitional period to attempt to achieve an equality in the assessment of coal properties.

And the Court is of the opinion that the relief prayed for by the taxpayers should be denied. I am aware that there may be some transitional inequality, but the approach by the assessor does take into consideration, in my opinion, the ability of some taxpayers to pay taxes. It's not just the coal companies that are involved. There are individuals who own coal property. And if the assessment is made on the basis of what is paid by the person who has an apparent unlimited ability to pay for coal purchased, if that figure is applied to [9] all of the

coal in the county regardless of who owns it, then some owners of coal will be obligated to let their coal interests go delinquent and lose it to the state.

I don't believe that the assessor has a right to apply heavy assessments and taxes to the rich, and light assessments and less taxes to those who are not so wealthy. I think that was the issue that was addressed in the Allegheny Pittsburgh, and East Kentucky Energy, and Oneida Coal cases. One or two taxpayers can not be compelled to pay a disproportionate part of the taxes, or the taxes that are assessed against any particular type of property.

The ultimate resolution of these types of cases, I don't think, is in immediate view. But hopefully, with the help of the state tax commissioner, and more thought and consideration, these problems can be solved so that some taxpayers are not permitted to pay an insufficient amount of taxes, and other taxpayers are not compelled to lose the value of real estate at which at some future time, at least, could benefit themselves and their heirs.

[10] I don't know whether this ruling covers all of the issues. I don't know whether I have any other issues at this point in time. But the Court will sustain the position of the assessor and the board of equalization and review in these cases. I anticipate that this ruling will be the same with regard to the other cases. I'm not so ruling, because some of the attorneys are not present.

WHEREUPON, NO FURTHER PROCEEDINGS WERE HAD IN THIS MATTER ON THIS DATE

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-12

PARDEE & CURTIN LUMBER COMPANY, *et al.*,
Petitioners

v.

WEBSTER COUNTY COMMISSION

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 12, 1993.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 6th day of July, 1993.

Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

No. 93-226

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

PARDEE & CURTIN LUMBER COMPANY AND
THE SUN LUMBER COMPANY,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

The County Commission of Webster County takes exception to Pardee & Curtin Lumber Company's and the Sun Lumber Company's characterization of the question presented by their petition for certiorari, and therefore restates it as follows:

QUESTION: Whether assessment of coal property using a weighted average, during a transitional period until a state-wide program to ensure equality is set in place, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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No. 93-226

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

PARDEE & CURTIN LUMBER COMPANY AND
THE SUN LUMBER COMPANY,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The Supreme Court of the United States in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), held that the "welcome stranger" assessment methodology employed at that time by the Webster County Assessor violated the Equal Protection Clause where state law required all property to be taxed according to its estimated market value.[1]

---

1. Article X, section 1 of the West Virginia Constitution provides, in part, that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as

Under the "welcome stranger" method of assessment, property is valued based on its purchase price, with the result being that similar parcels of property can be subjected to disproportionate tax burdens when one parcel bears a recent sales price and the purchase price for the other is very old.

In response to the decision in *Allegheny Pittsburgh*, West Virginia enacted a statute requiring the State Tax Commissioner to embark upon a statewide reappraisal of all property to facilitate the assessment of all property according to its true and actual value. See, W. Va. Code Section 11-1C-1, et seq. (reproduced in the appendix hereto). Until the statewide reappraisal is completed in 1993, the Webster County Assessor has temporarily employed a weighted average method to assess property taxes. Under the weighted average method, all property in the same class is valued at a certain amount per acre, representing the average of all values on which previous assessments of the class had been based, and assessed accordingly. Because an average value is used, rather than taking into consideration each property's individual characterisitics, some properties may be assessed at a greater proportion of their "true and actual value" than other properties though no proof was introduced below to show such disparities.

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directed by law." Section 11-3-1 of the West Virginia Code provides, in part, that "[a]ll property shall be assessed annually as of the first day of July at its true and actual value . . . ." The Supreme Court of the United States has recently held that a "welcome stranger" type of assessment methodology does not violate the Equal Protection Clause where state law does not require that assessments be made according to true and actual value. Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

Petitioners claim that the weighted average method of assessment violates the Equal Protection Clause because it fails to value property at its true and actual value, as required by state law. Petitioners appealed their assessments to the Webster County Commission, sitting as a Board of Equalization and Review. At the hearing before the County Commission, Petitioners submitted no evidence of the true and actual value of their properties; nor did Petitioners provide any evidence of the relative value of any other properties in the same class. The County Commission rejected Petitioners' arguments and upheld the assessments. Upon appeal of the County Commission's decision to the Circuit Court of Webster County, the Court affirmed the decision of the County Commission. Petitioners' Appendix 3a. Petitioners are appealing from the refusal of the West Virginia Supreme Court of Appeals to entertain Petitioners' appeal from the decision of the Circuit Court. See, Petitioners' Appendix 1a.

SUMMARY OF ARGUMENT

The assessment methodology employed by the Webster County Assessor is a temporary measure in place only until a statewide reappraisal is completed. The statewide reappraisal, scheduled for completion in 1993, is calculated to provide the Webster County Assessor with the true and actual values of the properties at issue in this case, as required by state law, and allow the Assessor to make assessments based on those values. As a short-term, interim method of assessment, the weighted average employed by the Webster County Assessor is valid and does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Cases relied upon by

Petitioners do not address the type of transitional scenario that exists in this case.

Furthermore, Petitioners have submitted no evidence of the true and actual value of their property, or the true and actual value of any other property in the same class, and have thus failed to establish a record that could show that they were victims of discrimination.

ARGUMENT

I.

THE WEIGHTED AVERAGE METHOD OF ASSESSMENT USED BY THE WEBSTER COUNTY ASSESSOR IS A TRANSITIONAL MECHANISM ONLY, AND IS THUS CONSISTENT WITH THE COURT'S DECISION IN *ALLEGHENY PITTSBURGH*

In affirming the Webster County Assessor's assessments of Petitioners, the Circuit Court stressed the temporary, transitional nature of the assessment method adopted by the Assessor. "The assessor in this instance has used a weighted average . . . . And the Court is of the opinion that that method of attempting to secure uniform and equal assessments is not constitutionally unsound under the circumstances. There may be some transitional inequality." Petitioners' Appendix 21a. "The assessor's position in making the assessments that are now and have been questioned was to attempt to obtain equality consistent with the Court's order previously entered by using a weighted average until the reevaluation being undertaken by the state tax commissioner's office could be fully implemented."

Petitioners' Appendix 21a. "This Court is of the opinion that there may be some transitional inequality here, but the Court is of the opinion that the assessor is not in a position to obtain substantial equality in one year." Petitioners' Appendix 22a. "[T]he assessor's position in attempting to carry out the court order was to use this as a transitional tool." Petitioners' Appendix 29a.

In the *Allegheny Pittsburgh* decision this Court recognized that transitional inequality in property tax appraisals does not violate the Equal Protection Clause.

> The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, it does not require immediate general adjustment on the basis of the latest market development. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

Allegheny Pittsburgh Coal Co. v., County Commission of Webster County, West Virginia, 488 U.S. 336, 343 (1989) (citations omitted).

This Court clearly understands that a reappraisal intended to insure the fairness of property tax assessments cannot be accomplished overnight. The State Tax Commissioner of West Virginia is currently in the third and final year of a statewide reappraisal of all property in West Virginia, as recognized by the Circuit Court. Petitioners' Appendix 23a ("there is now in the process of being implemented a phase-in period to obtain equality, which is under the direction of the state tax commissioner"). During the transition period before such a reappraisal is completed, the assessor does not have the appraisal information necessary to assess taxes based on a property's true and actual value; yet property tax assessments must continue in order for local government to operate. In the context of this transition period before the statewide reappraisal is complete, the weighted average method of assessing property taxes employed by the Webster County Assessor is reasonable, as recognized by the Circuit Court.

In the case of *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U.S. 23 (1931), relied upon by Petitioners, this Court addressed the constitutionality of an assessment methodology similar to that used by the Webster County Assessor in this case, but did not address the validity of such a methodology in the context of a transitional assessment period. The Court in *Cumberland Coal* held that a tax assessment system that valued all coal property in a township at the same amount per acre, regardless of the property's true value, violated the Equal Protection Clause where it resulted in "intentional" and "systematic" undervaluation of property in the same class as that of Cumberland, whose property was taxed at full value.. *Id.* However, nothing in the *Cumberland Coal* opinion indicates that an assessment methodology based on a weighted average valuation is

invalid in the context of a transition period when information regarding the true value of property is not yet available to the assessor. Nor do any of the cases from other jurisdictions cited by Petitioners address a scenario involving a transition period.

Substantial case law suggests that a temporary divergence from appraising property according to market value, as a part of an overall plan to equalize assessments, does not violate the Equal Protection Clause. This Court in *Allegheny Pittsburgh* cited to *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350 (1918). In *Sunday Lake Iron Co.,* a town raised the assessment of a particular mine, pursuant to state statute, but ran out of time and did not complete reassessments on other similar properties. When the taxpayer argued that time constraints could not justify the discrimination, this Court found no "purpose or design to discriminate. [The town's] action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal." *Id.* at 353. The *Sunday Lake Iron Co.* opinion has been relied upon often, and recently, to validate cyclical reappraisal systems. See, *Nash v. Assessor of Town of Southhampton,* 571 N.Y.S.2d 951 (A.D. 2d Dept. 1991); *Alexander v. Town of Barton,* 565 A.2d 1294 (Vt. 1989); see also, "Real-estate tax equalization, reassessment, or reevaluation program commenced but not completed within the year, as violative of constitutional provisions requiring equal and uniform taxation" 76 A.L.R.2d 1077.

In *Nash, supra,* the New York Supreme Court, Appellate Division considered a situation where property was reassessed when it was sold, subdivided, improved by new construction, or became subject to reassessment under a land equalization program. The Court in that case found a delay in reassessment of some property, but

denied summary judgment because questions remained regarding the nature and extent of purported inequities, how long such inequities would persist, and whether the disparate tax treatment arose out of intentional, invidious, or arbitrary discrimination. *Nash, supra* at 955.

In *Alexander, supra*, , the Supreme Court of Vermont validated a town's "rolling reappraisal" system, and specifically distinguished *Allegheny Pittsburgh* on the grounds that "it dealt with a system that acted to perpetuate discrimination rather than eliminating it. [Also] the disparities were far greater in magnitude than those present here and were essentially permanent." *Alexander, supra* at 1301 (emphasis added). Thus, recent cases dealing with the validity of local property tax systems have recognized that temporary inequality of taxation does not violate the Equal Protection Clause.

II.

PETITIONERS FAILED TO ESTABLISH A RECORD THAT COULD SUPPORT A CLAIM OF DISCRIMINATION

Unlike the taxpayers in *Allegheny Pittsburgh*, Petitioners do not claim that similarly situated property is taxed differently. Rather, Petitioners claim that the Equal Protection Clause is violated when differently situated property is taxed similarly. See, Petitioners' Petition for Writ of Certiorari, pages 9-12. Though their statement of the law may be an accurate (albeit contextually incomplete) reflection of this Court's opinion in *Cumberland Coal, supra*, Petitioners in the tribunals below failed to submit any evidence concerning the true and actual value of their properties, or any other properties, whether situated similarly or differently.

Thus, the record in this case, as summarized in the Petition, does not adequately support Petitioners' contention that properties of different values are taxed similarly. More importantly, however, even if the record supports an inference of inequality, no Petitioner made any effort to show that its properties, considered together, were undervalued relative to other taxpayers.

The circuit court remarked upon the lack of any evidence in the record regarding the true and actual values of Petitioners' properties, or the true and actual values of any other properties. See, Petitioners' Appendix 23a-24a ("There was a lack of evidence to show what the protested property, that there is a lack of evidence on part of the protesting taxpayers to show what the property in question was actually worth . . . . There wasn't evidence offered on behalf of the protesting taxpayers to show what the value of coal was. There was not evidence offered to show what the value of unmanaged timberland per acre was, that I recall. There was not evidence offered to show the value of unimproved land. The basic argument was that the assessment was wrong.") As recognized by the circuit court, Petitioners have failed to make any showing that they were injured by the alleged discrimination, and have thus failed to establish a record suitable for review by this Court.

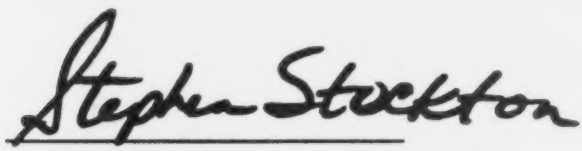
CONCLUSION

For the reasons stated, Respondent prays that the Writ of Certiorari be denied

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October 28, 1993

APPENDIX

West Virginia Code Section 11-1C-1.
Legislative findings.

(a) The Legislature hereby finds and declares that all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county and throughout the state.

(b) The Legislature by this article seeks to create a method to establish and maintain fair and equitable values for all property. The Legislature does not intend by this article to implement the reappraisal as conducted under articles one-a and one-b [sections 11-1A-1 et seq.and 11-1B-1 et seq.] of this chapter nor does it intend to affect tax revenue in any manner.

(c) The Legislature finds that requiring the valuation of property to occur in three-year cycles with an annual adjustment of assessments as to those properties for which a change in value is discovered shall not violate the equal and uniform provision of section one, article ten of the West Virginia Constitution, the Legislature further finding that such three year cycle and annual adjustment are an integral and indispensable part of a systematic review of all properties in order to achieve equality of assessed valuation within and among the counties of this state. Notwithstanding such finding, the Legislature intends to permit the assessors and the board of public works to place proportionately uniform percentage changes in values on the books during the the two tax years preceding the tax year beginning on the first day of July, one thousand nine hundred ninety-three,

in accordance with the provisions of section seven [section 11-1C-7] of this article.

(d) The Legislature deems that the goal of this article is that by the end of the three-year cycle contemplated by this article, and thereafter from year to year, all property shall be annually assessed at sixty percent of its then current fair market value except for the values derived for farms and managed timberland properties, which are to be valued as prescribed by this article, one-c and article four [sections 11-1C-1 et seq. and 11-4-1 et seq.] of this chapter. (1990, c. 172; 1990, 3rd Ex. Sess., c.5)

West Virginia Code Section 11-1C-3(a)

(a) There is hereby created, under the department of tax and revenue, a property valuation training and procedures commission which consists of the state tax commissioner, or a designee, who shall serve as chairperson of the commission, three county assessors, five citizens of the state, one of which shall be a certified appraiser, and two county commissioners. The assessors, five citizen members and two county commissioners shall be appointed by the governor with the advice and consent of the Senate. For each assessor to be appointed, the West Virginia assessors association shall nominate three assessors, no more than two of whom shall belong to the same political party, and shall submit such list of nominees to the governor. For each of the two county commissioners to be appointed, the county commissioner's association of West Virginia shall nominate three commissioners, no more than two of whom shall belong to the same political party, and shall submit such list of nominees to the governor. Except for the tax commissioner, there may not be more than one member from any one county. No more than seven

members of the commission shall belong to the same political party: Provided, That any member of the commission who is a direct party to any dispute before the board shall excuse himself or herself from any consideration or vote regarding the dispute. By the first day of November, one thousand nine hundred ninety, the governor shall appoint the fifth citizen member, who shall serve a two-year term.

West Virginia Code Section 11-1C-4(a)(2)

(a) On or before the first day of October, one thousand nine hundred ninety, and thereafter as necessary the property valuation training and procedures commission shall perform the following duties:

(2) Establish uniform, statewide procedures and methodologies for the mapping, visitation, identification and collection of information on the different species of property, which procedures and methodologies shall include reasonable requirements for visitation of property, including a requirement that a good faith effort be made to contact any owner of owner-occupied residential property: Provided, That the commission is not authorized to establish the methods to value real and personal property, but shall have the authority to approve such methods.

West Virginia Code Section 11-1C-7

Duties of county assessors; property to be appraised at fair market value; exceptions; initial equalization; valuation plan.

(a) Except for property appraised by the state tax commissioner under section ten [section 11-1C-10] of this article and property appraised and assessed under article six [section 11-6-1 et seq.] of this chapter, all assessors shall, within three years of the approval of the county valuation plan required pursuant to this section, appraise all real and personal property in their jurisdiction at fair market value except for special valuation provided for farmland and managed timberland. They shall utilize the procedures and methodologies established by the property valuation training and procedures commission and the valuation system established by the tax commissioner.

(b) In determining the fair market value of the property in their jurisdictions, assessors may use as an aid to valuation any information available on the character and values of such property including, but not limited to, the updated information found on any statewide electronic data processing system network established pursuant to section twenty-one [section 11-1A-21], article one-a of this chapter. Valuations shall not be based exclusively on such statewide electronic data processing system network, and usage of the information on such files as an aid to proper valuation shall not constitute an implementation of the statewide mass reappraisal of property.

(c) Before beginning the valuation process, each assessor shall develop a county valuation plan for using information currently available, for checking its accuracy

and for correcting any errors found. The plan must be submitted to the tax commissioner on or before the first day of December, one thousand nine hundred ninety, for review and approval, and such plan must be revised as necessary and resubmitted every three years thereafter. Whenever a plan is submitted to the tax commissioner, a copy shall also be submitted to the county commission of that county and the property valuation training and procedures commission, and that county commission and the property valuation training and procedures commission may forward comments to the tax commissioner. The tax commissioner shall respond to any plan submitted or resubmitted within sixty days of its receipt. The valuation process shall not begin nor shall funds provided in section eight [section 11-1C-8] of this article be available until the plan has received approval by the tax commissioner: Provided, That any initial plan that has not received approval by the commissioner prior to the first day of May, one thousand nine hundred ninety-one, shall be submitted on or by such date to the valuation commission for resolution prior to the first day of July, one thousand nine hundred ninety-one, by which date all counties shall have an approved valuation plan in effect.

(d) Upon approval of the valuation plan, the assessor shall immediately begin implementation of the valuation process. Any change in value discovered subsequent to the certification of values by the assessor to the county commission, acting as the board of equalization and review, in any given year shall be placed upon the property books for the next certification of values: Provided, That notwithstanding any other provision of this code to the contrary, the property valuation training and procedures commission may authorize the tax commissioners to approve a valuation plan and the board of public works to submit such a plan which would permit

the placement of proportionately uniform percentage changes in values on the books that estimate the percentage difference between the current assessed value and sixty percent of the fair market value for classes or identified sub-classes of property and distribute the change between the two tax years preceding the tax year beginning on the first day of July, one thousand nine hundred ninety-three. This procedure may be used in lieu of placing individual values on the books at sixty percent of value as discovered, or may be in addition to such valuation. If such procedure is adopted by a county, then property whose reevaluation is the responsibility of the board of public works and the state tax commissioner shall have its values estimated and placed on the books in like manner. Such estimates shall be based on the best information obtained by the assessor, the board of public works and the tax commissioner, and the changes shall move those values substantially towards sixty percent of fair market value, such sixty percent to be reached on or before the first day of July, one thousand nine hundred ninety-three.

West Virginia Code Section 11-1C-9.
Periodic Valuations

(a) After completion of the initial valuation required under section seven [section 11-1C-7] of this article, each assessor shall maintain current values on the real and personal property within the county. In repeating three-year cycles, every parcel of real property shall be visited by a member of the assessor's staff who has been trained pursuant to section six [section 11-1C-6] of this article to determine if any changes have occurred which would affect the valuation for the property. With this information and information such as sales ratio studies provided by the tax commissioner, the assessor shall

make such adjustments as are necessary to maintain accurate, current valuations of all the real and personal property in the county and shall adjust the assessments accordingly.

(b) In any year [that] the assessed value of a property or species of property be less than or exceed sixty percent of current market value, the tax commissioner shall direct the assessor to make the necessary adjustments. If any assessor fails to comply with the provisions of this section, the tax commissioner may, at the county commission's expense, take reasonable steps to remedy the assessment deficiencies (1990, c. 172.)

West Virginia Code Section 11-C-10(a)(2)

(a) As used in this section:

(2) "Natural resources property" means coal, oil, natural gas, limestone, fireclay, dolomite, sandstone, shale, sand and gravel, salt, lead, zinc, manganese, iron ore, radioactive mineral, oil shale, managed timberland as defined in section two [section 11-1C-2] of this article, and other minerals.

West Virginia Code Section 11-C-10(d)

(d) Within three years of the approval date of the plan required for natural resources property required pursuant to subsection (e) of this section, the state tax commissioner shall determine the fair market value as defined in section one [section 11-3-1], article three of this chapter of all natural resources property in the state. The commissioner shall thereafter maintain accurate values for all such property.

West Virginia Code Section 11-1C-10(b)

All owners of industrial property and natural resources property each year shall make a return to the state tax commissioner and, if requested in writing by the assessor of the county where situated, to such county assessor at a time and in the form specified by the commissioner of all industrial or natural resources property owned by them. The commissioner may require any information to be filed which would be useful in valuing the property covered in the return. Any penalties provided for in this chapter or elsewhere in this code relating to failure to list any property or to file any return or report may be applied to any owner of property required to make a return pursuant to this section.

West Virginia Code Section 11-1C-12.
Board of equalization and review; assessments; board of public works.

(a) As valuations of property in a county are completed to the extent that a total valuation of property can be determined, such valuation shall be delivered by the assessor to the county commission, and the county commission, sitting as a board of equalization and review, shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes of the several classes of property.

(b) For the tax year subsequent to the end of the initial valuation period in each county, and for each year thereafter, each county shall implement a uniform assessment that is equal to sixty percent of the most current appraised value for all real and personal property

situated within the county. Such implementation shall be in accordance with provisions to be included in the plan required by section seven [section 11-1C-7] of this article.

(c) Until such time as the uniform sixty percent assessment required in subsection (b) is effected, the total assessed valuation in each of the four classes of property shall not be less than sixty percent nor more than one hundred percent of the appraised valuation of each said class of property.

No. 93-226

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PARDEE & CURTIN LUMBER COMPANY and
THE SUN LUMBER COMPANY,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Webster County, West Virginia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. The Brief in Opposition ("Opp.") filed by the County Commission of Webster County is remarkable for what it does *not* say. The County does not dispute our showing that this Court held, in *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments,* 284 U.S. 23 (1931), that it violates the Equal Protection Clause to assess property at a flat rate per acre when state law requires property to be assessed on the basis of its actual value. Indeed, the County expressly acknowledges that *Cumberland Coal* so held. *See* Opp. 6. Nor does the County question our showing that this Court reaffirmed the continuing validity of *Cumberland Coal* in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County,* 488 U.S. 336 (1989). In addition, the County does not challenge our showing that other state supreme courts applying *Cumberland Coal* and *Allegheny Pitts-*

burgh have struck down assessment practices like the one at issue here. *See* Pet. 20-23. Indeed, the County fails even to cite, much less confront, the conflicting authorities analyzed in the petition. Finally, the County Commission concedes that the assessment methodology struck down by this Court in *Cumberland Coal* was "similar to that used by the Webster County Assessor in this case * * *." Opp. 6. The County's sole defense is that it only plans to engage in this equal protection violation for a while.

According to the County, the same assessment practice struck down by this Court in *Cumberland Coal* may nonetheless be employed by Webster County in this case as a "transitional" mechanism. No case from this Court supports the County's assertion. The cases the County relies upon involve cyclical reappraisals—reassessing a portion of the property in a particular class on the basis of new appraisals one year, another portion the next, and so on until the entire class is assessed on the basis of actual value within a short period. Owners whose property is reassessed at the beginning of the cycle generally cannot complain that they are over-assessed compared to owners who will not be reassessed until the end of the cycle. That is what *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350 (1918)—relied upon by the County, Opp. 7—was about, and what this Court in *Allegheny Pittsburgh* was referring to in the passage quoted by the County. *See* Opp. 5. Indeed, this Court in *Sunday Lake Iron* expressly noted that the transitional inequity caused by the taxing authority's failure to complete a general revaluation was successfully rectified "[t]he very next year." 247 U.S. at 353.

Nothing of that sort is going on here. Here the Assessor made no attempt to assess property on the basis of actual value, incrementally or otherwise. Petitioners are not objecting that their property has been reassessed, while other property of the same class has not. The objection is simple: the County is employing an assess-

ment practice with respect to the entire class of property that this Court has found to be unconstitutional. In other words, the objection is not to a transitional inequality that comes about as a result of a *system* that will, over a short period of time, achieve general equality of treatment. The objection is instead to the inequality of treatment inherent in the system itself, where nothing about the system being employed—the flat rate system struck down in *Cumberland Coal*—will achieve equality over time. Equal treatment can come about not through the system being challenged, but only by rejecting it. The unequal treatment is therefore not "transitional" in the sense considered by this Court in *Sunday Lake Iron* or *Allegheny Pittsburgh*.

The violation of equal protection may or may not be temporary, depending on whether or not the County abandons it. But this Court has never considered it an adequate response to an acknowledged equal protection violation for the violator to assert that the violation will only last for a few years.

2. The County briefly contends that petitioners' claim is not cognizable because they failed to present evidence of the actual value of their properties. Opp. 8-9. The whole point is that the Assessor studiously refused to consider evidence of actual value, turning a blind eye to such questions as whether the property was being mined or was unmineable, barren, or mined out. *See* Pet. 4-5. The record is clear that petitioners presented abundant evidence—maps prepared by mining engineers, exhibits, and affidavits—detailing the variance in the presence of merchantable, mineable coal on property taxed as coal property. In particular, petitioners' evidence demonstrated that among the property they owned taxed as coal property were parcels containing no mineable coal. *See* Transcript of Hearing, Webster County Commission, at 138 (Feb. 21, 1990) (Sun Lumber map and exhibit), 223 (Feb. 26, 1990) (Pardee & Curtin map and affi-

davit). The record is also clear that the Assessor's adoption of the unconstitutional *Cumberland Coal* system led to an increase in Pardee & Curtin's assessment of 221 percent and in Sun Lumber's of 393 percent. Exhibit A, Petition for Appeal and Note of Argument on Behalf of Petitioners Below (Dec. 17, 1992).

The County conceded the obvious below, acknowledging that the Assessor's practice "may be unfair to those class of taxpayers who do not have coal," while "it is a terrific bargain for those who have a considerable amount of coal." Memorandum of Law and Brief of Argument on Behalf of County Commission of Webster County at 3-4, In re: 1990 Tax Assessment Cases, Circuit Court of Webster County (Feb. 26, 1992). The County cannot now claim that the record does not support the proposition that properties of different value are taxed the same. In fact, petitioners satisfied their burden of showing an equal protection violation in the same manner as the taxpayers in *Cumberland Coal*.

3. Webster County's assessment system was struck down by this Court in *Allegheny Pittsburgh* because it bore no rational relation to current market value. *See* Pet. 18-19. In response the County has adopted another system that—just like the one struck down by this Court—expressly eschews consideration of actual value. The unequal treatment inherent in that system cannot be defended as simply a transitional feature of an otherwise valid system. As this Court squarely held in *Cumberland Coal*, the system itself violates equal protection. This Court should grant the writ to enforce compliance with its holdings, and to resolve the conflict between the decision below and the decisions of state courts faithfully applying *Cumberland Coal* and *Allegheny Pittsburgh*.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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